U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 November 2004

CASE NOS. 2003-LHC-02420
2004-LHC-00603

OWCP NOS. 01-154642
01-088348

In the Matter of

WILLIAM THOMAS CURRY, III
Claimant

v.

ELECTRIC BOAT CORPORATION
Employer/Self-Insured

Appearances:

David N. Neusner (Embry & Neusner),
Groton, Connecticut, for the Claimant

Edward W. Murphy (Morrison, Mahoney & Miller)
Boston, Massachusetts, for the Employer

Before: Daniel F. Sutton, Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding involves claims for workers' compensation benefits filed by William Thomas Curry, III (the "Claimant") against the Electric Boat Corporation ("EBC") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA"). The Claimant worked for EBC as a carpenter for approximately 21 years until October 26, 2001 when he suffered a work-related injury which precluded his return to his pre-injury job as a shipyard carpenter. Although he has continued to work for EBC in an alternate capacity as a contractor's escort, it is undisputed that he has suffered a loss of wage-earning capacity as a result of his injury and, therefore, is entitled to permanent partial disability compensation for this loss pursuant to section 8(c)(21) of the LHWCA. He now seeks additional compensation pursuant to section 8(c)(2) based on a permanent partial loss of the use

of his right leg which he attributes to the October 26, 2001 work-related injury. This matter was referred to the Office of Administrative Law Judges ("OALJ") for hearing after an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP") failed to produce a mutually satisfactory resolution.

Pursuant to notice, a formal hearing was conducted before me in New London, Connecticut on February 24, 2004, at which time the Claimant appeared represented by counsel, and an appearance was made on behalf of EBC. The Claimant testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-6 and EBC Exhibits ("EX") 1-9. In addition, the parties submitted stipulations and a proposed order for payment of section 8(c)(21) compensation as Joint Exhibits ("JX") 1 and 2. At the close of the hearing, the record was held open at the Claimant's unopposed request for it to offer the transcript of a deposition taken of Dr. Daniel Glenney which was submitted by letter dated March 15, 2004 and admitted as CX 7. Thereafter, the parties filed post-hearing briefs, and the record is now closed.

Upon review of the evidence of record and consideration the parties' arguments, I conclude that the Claimant is entitled, as agreed by the parties, to an award of permanent partial disability compensation for the loss of wage-earning capacity caused by work-related injuries. I will also award him interest on any unpaid compensation and attorney's fees, and I will allow EBC to take a credit against its compensation liability in the amount of its past voluntary compensation payments. I deny the claim for an additional compensation pursuant to section 8(c)(2) based on my finding that the Claimant did not suffer any actual injury to his leg as required by that section for a loss of use award. However, I find that the October 26, 2001 work-related injury aggravated the Claimant's pre-existing degenerative arthritis of the right hip and, therefore, award him medical care for this condition to be furnished by EBC. My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. Background

As a carpenter, the Claimant worked at EBC's submarine building and repair facility which is located in Groton, Connecticut on the shores of the navigable Thames River. Hearing Transcript ("TR") at 26-27. His primary responsibility was the construction of staging both around and inside of submarines being worked on by other shipyard trades. TR 27-28, 32. Prior to October 26, 2001, he had suffered work-related injuries to a finger, his left foot, left shoulder, right knee and back. TR 37. However, he denied any significant back problems or treatment for his right hip prior to the October 26, 2001 injury. TR 37.

On October 26, 2001, he accidentally stepped into a cleat or "capstan" enclosure that was recessed about 14 inches into the deck of a submarine, causing him to fall and sustain injuries to his right leg, right hip and lower back. TR 34-35; EX 5. He was referred by his primary care doctor to the Norwich Orthopedic Group where he was initially seen on November 1, 2001 by Gabriel Abella, M.D., a physical medicine and rehabilitation specialist, with complaints of low back, right hip and right leg pain. CX 3 at 1. Dr. Abella's diagnosis was (1) a right anterior

tibial contusion injury, (2) right hip synovitis caused by a work-related fall and pre-existing "DJD" (degenerative joint disease), and (3) lumbar sprain/strain injury with possible facet joint syndrome. *Id.* Dr. Abella released the Claimant to return to work on a full-time basis beginning on November 5, 2001. *Id.*

The Claimant returned to Dr. Abella's office on November 16, 2001 at which time he reported difficulty tolerating his work without restrictions. CX 3 at 3. Dr. Abella's impression was lower back pain with lumbar radiculopathy and persistent right hip synovitis with pre-existing DJD, and he placed the Claimant on work restrictions related to bending, working at heights, weight-bearing and walking. *Id.* The Claimant worked with these restrictions until December 14, 2001 when he was laid off by EBC. TR 38-39. He was recalled by EBC on February 24, 2002 and has continued to work since that time in a light duty capacity as a contractor escort. TR 39.

B. Stipulations and Issues Presented

The parties have offered the following stipulations which I adopt as findings of fact:

1. This matter arises under the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

2. An employment relationship existed at all relevant times;

3. The Claimant sustained an injury to his right hip and lower back which arose in and out of the course of his employment with the employer on October 26, 2001;

4. The notice, claim and controversion requirements of the Act were complied with in a timely matter;

5. The average weekly wage is $1,291.48 and the 2/3 compensation rate is $861.42;

6. The Claimant has received compensation at various rates for periods of temporary total or partial disability from October 26, 2001 to the present;

7. The Claimant reached a point of maximum medical improvement on January 17, 2003 with respect to his lower back and has sustained permanent partial disability of the back;

8. The Claimant has worked in a light duty capacity for Electric Boat as an escort from February 25, 2002 to the present, earning an average weekly wage of $485.98; and

9. The Claimant's actual earnings as an escort reasonably reflect his post-injury wage-earning capacity.

JX 2. Since the stipulated facts show that the Claimant has suffered a loss of wage-earning capacity as a result to the October 26, 2001 injury, the parties propose that he be awarded permanent partial disability compensation pursuant to section 8(c)(21) of the LHWCA commencing January 17, 2003 at a weekly rate of $537.00, which is equal to two-thirds of the difference between the Claimant's pre-injury average weekly wage and the Claimant's post-injury actual earning capacity. *Id.* The parties have further agreed that EBC is entitled to a credit against this compensation liability pursuant to section 14(j) of the LHWCA in the amount of the benefits paid to the Claimant for temporary partial disability from January 17, 2003 to the present. *Id.*

What is in dispute between the parties is whether the Claimant is additionally entitled an award of permanent partial disability compensation under sections 8(c)(2) and (19) of the LHWCA for a 20 percent partial loss of the use of his right leg.[1] The Claimant asserts that the October 26, 2001 injury aggravated his previously asymptomatic right hip condition resulting in loss of cartilage at the femoral head and thereby compromising the functioning of the hip joint. Relying on the opinions of the two medical experts, which are discussed below, that the loss of cartilage has resulted in a permanent impairment rating of 20 percent for his right lower extremity, the Claimant seeks a 20 percent permanent partial disability award under sections 8(c)(2) and (19). EBC raises three defenses to this claim. First it contends that the Claimant's impairment was not caused or aggravated by the October 26, 2001 injury. Next, it argues that the injury and resulting impairment involve the Claimant's hip, not his leg, and that the hip is not a body part for which "loss of use" compensation is available under section 8(c). Finally, it

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[1] Section 8(c) in relevant part states,

> Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee as follows:
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> * * * * *
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> (2) Leg lost, two hundred and eighty-eight weeks' compensation.
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> * * * * *
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> (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

33 U.S.C. § 908(c).

contends that even if it is determined that the Claimant has suffered a permanent loss of use of his right leg due to the October 26, 2001 injury, allowing him to obtain a section 8(c)(2) award in addition to a section 8(c)(21) award for the same injury would place him a better financial position that he would be in if he had never been injured.

C. Is the Claimant's impairment causally related to the October 26, 2001 injury?

The cause of the Claimant's impairment has been addressed by two medical experts, Daniel T. Glenney, M.D., who is the Claimant's treating physician, and Philo F. Willetts, Jr., M.D., an expert retained by EBC. Both doctors are board-certified in orthopedics. CX 7 at 3; EX 9. As EBC notes in its brief, there is substantial agreement between Drs. Glenney and Willetts on several points. They agree that the Claimant has a 20 percent impairment of his right lower extremity, and they both used the same methodology, which is to radiologically measure the remaining articular cartilage in the hip joint, to arrive at the impairment rating. CX 7 at 17-18; EX 8 at 33-34. Drs. Glenney and Willetts based their impairment ratings on criteria set forth in the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition (the "AMA Guides"), the pertinent provisions of which were introduced in evidence as CX 6. They also agree that the Claimant suffered from asymptomatic degenerative osteoarthritis in the right hip prior to the October 26, 2001 injury and that the October 26, 2001 injury likely caused the pre-existing condition to be come symptomatic. CX 1 at 1; CX 7 at 16-17; EX 8 at 28, 34-35. However, Drs. Glenney and Willetts disagree on the question of whether the October 26, 2001 injury contributed to the Claimant's permanent impairment. Regarding contribution, Dr. Glenney stated in a report dated December 19, 2002 that,

> The patient obviously had degenerative arthritis of his left [sic] hip prior to the 10/26/01 work related injury. I assign 5% of the total 20% [impairment] to the work related injury of 10/26/01. The remaining 15% is assigned to the pre-existing arthritis prior to the injury. The patient was asymptomatic prior to the injury & I believe his work related injury of 10/26/01 essentially set off the patient's hip arthritis.

CX 1 at 1. Dr. Willetts formed a different opinion after examining the x-ray films of the Claimant's right hip joint. In this regard, he stated that the two millimeter articular cartilage space in the right hip, which forms the basis of the 20 percent impairment rating assessed by both physicians, clearly pre-existed the October 26, 2001 injury. EX 8 at 34. He explained his rationale as follows:

> Such and injury would not cause a sudden decrease in cartilage space. The other findings on the x-ray supports a very chronic moderately advanced degenerative arthritis of the right hip, with spur formation over the femoral head and the lateral acetabular socket of the hip. Thus, all of the findings to justify 20% right lower extremity permanent impairment were present before October 26, 2001.

Id. at 34-35. At his deposition, Dr. Glenney conceded Dr. Willett's point that the loss of articular cartilage in the hip joint, which formed the basis of his 20 percent permanent impairment rating, was not changed by the October 26, 2001 injury, and he testified that an x-ray taken immediately

prior to the injury "would be identical to the x-ray subsequent to the injury . . . [because] the loss of articular cartilage height happens over a long period of time. It doesn't happen in an instant." CX 7 at 17. However, he remained of the view that the October 26, 2001 injury contributed to the Claimant's impairment:

> The significance, in my mind, was that the patient was historically asymptomatic prior to that injury. The degenerative arthritis, obviously, pre-dates the injury. The x-ray changes are long-standing, they take a long time to develop. So, at the time of the injury, he had arthritis in the hip, but he didn't know it. And he wasn't symptomatic and I believe the injury set it off or started it to become symptomatic.

Id. at 16. He also noted that his physical examination showed that the Claimant had limited motion and a very irritable hip after the October 26, 2001 injury. *Id.* at 18.

The LHWCA places the initial burden on the Claimant to prove that he suffered an injury arising out of and in the course of his employment. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700 (2nd Cir. 1982). As discussed above, the parties have stipulated that the Claimant suffered a work-related injury to his back and right hip on October 26, 2001. Moreover, EBC conceded at the hearing that the injury aggravated the underlying arthritis in the Claimant's right hip. TR 11-12. Nevertheless, EBC argues that inasmuch as the medical opinions show that the injury did not cause, aggravate or hasten the Claimant's loss of articular cartilage space, which is the basis for the doctors' impairment ratings, it has successfully rebutted the presumption that the impairment is related to the Claimant's injury and his employment at EBC. TR 12-13; EBC Brief at 2-4.[2]

If loss of cartilage space as measured under the AMA Guides was the sole criterion upon which a section 8(c)(2) award could be made, EBC's argument might be persuasive. However, the LHWCA "does not require adherence to any particular guide or formula . . . [and] the administrative law judge [is] not bound by the doctor's opinion . . . the Guides or any other particular formula for measuring disability." *Mazze v. Frank J. Holleran, Inc.*, 9 BRBS 1053, 1055 (1978). *See also Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891, 897 (1981) ("It is clear that the Administrative Law Judge is not bound by any particular formula when determining the degree of permanent partial disability and that it is within his discretion to assess a degree of disability different from the ratings found by the physicians if that degree is reasonable."). Rather, the ALJ is *required* to consider not only the impairment ratings provided by doctors but any other relevant evidence of record including the doctors' observations and the

[2] Although EBC argues that it has rebutted any presumption that the Claimant's impairment is related to the October 26, 2001 injury, it contends that the section 20(a) presumption does not apply to the question of whether an impairment is causally related to an injured worker's employment. EBC Brief at 3 n.1. EBC is wrong on this point as it has long been settled that the section 20(a) presumption, while not available to help a claimant meet the initial burden of establishing the fact of a physical injury, does apply to the issue of causation including whether a physical injury and resulting disability are causally related to a claimant's employment. *See Novak v. I.T.O. Corp. of Baltimore*, 12 BRBS 127, 129 (1979).

claimant's description of symptoms and physical effects of an injury. *Pimpinella v. Universal Maritime Service, Inc*., 27 BRBS 154, 159-160 (1993).

In this case, Dr. Willetts looked only at the Claimant's loss of articular cartilage space in arriving at his assessment of a 20 percent permanent impairment under the AMA Guides, while Dr. Glenney additionally considered the Claimant's traumatic onset of symptoms following the October 26, 2001 injury and his physical finding of a reduced range of motion. In my view, Dr. Glenney's opinion is better reasoned and appropriately supported by the totality of relevant evidence. Accordingly, I give his opinion greater weight and find that a preponderance of the evidence establishes that the October 26, 2001 injury contributed to the Claimant's symptomatic right hip condition. Since the evidence thus establishes that the work-related injury played a role in the manifestation of the Claimant's arthritis, it is irrelevant that the underlying disease was not work-related and could have manifested itself at some other time without the injury, and the entire resulting disability is compensable. *See Cairns v. Matson Terminals*, 21 BRBS 252, 257 (1988). Therefore, even if it is assumed that Dr. Willetts' opinion is sufficient to rebut the presumed causal connection between the Claimant's right hip impairment and his employment at EBC, the undisputed fact that the October 26, 2001 injury aggravated the pre-existing arthritic condition and caused it to become symptomatic compels the conclusion that the totality of evidence establishes that the Claimant's right hip condition and any resulting disability are causally related to his EBC employment and, therefore, fully compensable. *See Seaman v. Jacksonville Shipyards*, 14 BRBS 148.9, 153-154 (1981). I will now turn to the question of whether the Claimant's entitlement to compensation for this disability is governed by section 8(c)(21) alone or whether the Claimant is additionally entitled to a separate Loss of use award under sections 8(c)(2) and (19).

D. Has the Claimant suffered a compensable loss of use of his right leg?

EBC's argues that the injury for which the Claimant seeks additional permanent partial disability compensation is to his hip which is not a body part covered by the schedule of compensable losses contained in section 8(c). Thus, it contends that section 8(c)(2), which covers loss of use of a leg, is simply inapplicable and that the Claimant's sole source of compensation recovery for his permanent partial disability is found in section 8(c)(21). In advancing this argument, EBC places analogical reliance on the Benefits Review Board's consistent holdings that injuries to the shoulder are not compensable as loss of an arm under section 8(c)(1) even though the shoulder injury results in an impairment of the arm. EBC Brief at 4-5, citing *Grimes v. Exxon USA*, 14 BRBS 573, 576 (1981); *Andrews v. Jeffboat, Inc*., 23 BRBS 169, 173 (1990); *Burkhardt v. Bethlehem Steel Co*., 23 BRBS 273, 275 (1990).[3] EBC also notes that the Courts have approved the Board's position that that the schedule is not applicable where the actual injury is to a part of the body not specifically listed in the schedule even if the injury results in disability to a scheduled body part. *See Long v. Director, OWCP*, 767 F.2d 1578, 1582-1583 (9th Cir. 1985) (employee who suffers injury to back not entitled to schedule

[3] EBC notes that the Board affirmed a section 8(c)(2) award based upon a hip injury in *Davenport v. Apex Decorating Co*., 13 BRBS 1029, 1033-1034 (1981), but it correctly points out that the Board did not address the applicability of section 8(c)(2) because the issue raised on appeal was limited to the proper amount of compensation. EBC Brief at 5 n.3.

award under section 8(c)(2) for resulting partial loss of use of leg); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 402 (9th Cir. 1981) (injury to neck and shoulder with loss of function in each arm), *cert. denied*, 459 U.S. 1034 (1982); *Hole v. Miami Shipyards Corp*., 640 F.2d 769, 772-773 (5th Cir. 1981) (injury to back resulting in leg pain).

The Claimant agrees with EBC that the cases dealing with shoulder injuries provide an "apt" analogy, and he suggests that the "Board addressed essentially the same issues as presented by the instant matter in Bivens v. Newport News Shipbuilding and Dry Dock Co., 23 BRBS 233 (1990)." Claimant's Brief at 9. In *Bivens*, the ALJ found that the Claimant had suffered an "actual injury in terms of physical damage and permanent disability in both the arm and shoulder, viz., the bicep's tear on the upper arm and adhesions and capsulitis in the shoulder joint and loss or articular surface in the shoulder. 20 BRBS 100, 112 (ALJ). However, the ALJ declined to award the Claimant compensation under section 8(c)(1) for the permanent partial disability affecting his arm in addition to lost wage benefits under section 8(c)(21) because he found that the primary disability involved the shoulder. On appeal, the Board upheld, as supported by substantial evidence, the ALJ's finding that the claimant had sustained an actual injury and disability to both his right arm and his right shoulder, but it rejected the ALJ's conclusion that the primary situs of disability is determinative of the type of compensation to be awarded. 23 BRBS at 237. Instead, the Board stated that the case was controlled by *Frye v. Potomac Electric Power Co.*, 21 BRBS 194 (1988) which held that "where claimant suffers two distinct injuries arising from a single accident, one compensable under the schedule and one compensable under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), he may be entitled to receive compensation under both the schedule and Section 8(c)(21)." *Id.* Applying *Frye* to the facts found by the ALJ, the Board went on to hold,

> In the instant case, the administrative law judge's finding that claimant sustained an injury to the shoulder joint itself, in the form of adhesions, capsulitis, and loss of articular surface, supports the administrative law judge's award under Section 8(c)(21). The administrative law judge also found, however, that claimant sustained actual injury and disability to his right arm due to the biceps tendon tear. Under *Frye*, claimant may be entitled to a schedule award based on impairment of his right arm due to the biceps tendon tear alone. We must therefore remand the case for the administrative law judge to reconsider whether claimant is entitled to a schedule award for the injury to his right arm, in addition to the Section 8(c)(21) award for the injury to his right shoulder, in light of the Board's decision in *Frye*.

Id. The Claimant submits that "Bivens is right on point" because "Mr. Curry sustained an injury to the femoral head, contributing to cartilage loss and disability in the right leg." Claimant's Brief at 9. Since the femur or "thigh bone" is part of his leg, the Claimant reasons that the injury for compensation purposes is properly classified as a leg injury for which compensation under the schedule should be awarded in addition to the permanent partial disability compensation awarded pursuant to section 8(c)(21) for loss of wage-earning capacity attributable to his right hip and lower back injuries. Claimant's Brief at 7.

In my view, *Bivens* is distinguishable from the instant case, and the Claimant's attempt to characterize his injury as one to the leg as well as the hip is both anatomically unsound and lacks support in either the medical evidence or the cited cases. Unlike *Bivens* where the claimant suffered a tear of the biceps muscle which is located in the upper arm and outside of the shoulder joint, the Claimant's injury to the cartilage space is clearly located within the hip joint as evidenced by the reports from Drs. Glenney and Willetts who arrived at the same diagnosis of degenerative arthritis of the right hip. CX 1; CX 3 at 4; EX 8 at 33.[4] Therefore, while the Claimant is correct that his section 8(c)(2) claim is analogous to cases involving shoulder/arm claims brought under section 8(c)(1), I find that his reliance on *Bivens* is misplaced because there is no evidence that he sustained an actual injury to his leg. Since the medical evidence shows that his actual injury was to the hip joint, I find that denial of section 8(c)(2) compensation is warranted for the same reason that section 8(c)(1) compensation was denied for shoulder injuries in the *Grimes*, *Andrews* and *Burkhardt* cases cited by EBC.[5]

E. What compensation and other benefits are due the Claimant?

Based on the parties' stipulation and proposed order, I find that the Claimant is entitled to an award of permanent partial disability compensation pursuant to section 8(c)(21) of the LHWCA commencing January 17, 2003 at a weekly rate of $537.00, which is equal to two-thirds of the difference between the Claimant's pre-injury average weekly wage and the Claimant's post-injury actual earning capacity. The Claimant is entitled to interest on any unpaid compensation due under this award. *See Foundation Constructors v. Director*, OWCP, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F.2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (1982) as of the filing date of this Decision and Order with the District Director. I further find on the basis of the parties' stipulation that EBC is entitled to a credit against this compensation liability pursuant to section 14(j) of the LHWCA in the amount of the compensation paid to the Claimant for temporary partial disability from January 17, 2003 to the present.

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[4] It is noted that Dr. Abella listed a diagnosis of a tibial contusion at the time that he first saw the Claimant following the October 26, 2001 fall at work. CX 3 at 1. However, any injury to the leg is not mentioned in the subsequent medical records, and there is no evidence that any leg contusion that the Claimant sustained as a result of the October 26, 2001 incident resulted in any lasting disability or in any way contributed to the permanent impairment addressed by Drs. Glenney and Willetts.

[5] In view of my finding that the Claimant is not entitled to a section 8(c)(2) loss of use award in addition to the agreed-upon loss of earning capacity award under section 8(c)(21), it is not necessary to address EBC's argument that the 8(c)(2) award sought by the Claimant in this case would provide him with compensation in excess of the maximum amount provided by the LHWCA for total disability contrary to the holding in *Green v, I.T.O. Corp. of Baltimore*, 185 F.3d 239 (4th Cir. 1999).

In view of my determination that the Claimant's right hip condition arose out of and in the course of his employment at EBC, he is entitled to have EBC "furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). Even though the Claimant's degenerative arthritic condition predated the October 26, 2001 injury, EBC's cannot avoid liability for his medical care because the LHWCA extends to pre-existing conditions which are aggravated by a work-related injury. *Potenza v. United Terminals, Inc*., 524 F.2d 1136, 1137 (2d Cir. 1975).

Finally, I conclude that the Claimant, having utilized an attorney to successfully establish his right to additional compensation, is entitled to an award of attorneys' fees under section 28 of the LHWCA. *See American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976). The Claimant's attorneys have filed an itemized application for fees and expenses totaling $8,744.55 ($7,891.25 in fees and $853.30 in expenses). EBC objects to the requested fees on the following grounds: (1) the application is premature since the Court has not ruled on the merits of the claim; and (2) the $250.00 hourly rate claimed for attorney's work.[6]

The first objection is of course now moot. In regard to its objection to the $250.00 hourly rate, EBC cites the decision of the Board in *Dousis v. Electric Boat Corp*., BRB No. 02-0407 (Jan. 30, 2003) (unpublished) where a majority of the Board awarded fees to Embry & Neusner based upon an hourly rate of $220.95. Slip op. at 4.[7] EBC also points out that The 2001 Small Law Firm Economic Survey (Altman Weil, Inc. 2001) shows a standard average billing rate of $177.00 per hour in Southern New England. Objection at 2-3. And, it submitted an affidavit from the Director of its Workers' Compensation Self-Administration unit who states that EBC received fee schedules in 2001 from ten workers' compensation law firms practicing in Southern New England Small and that the average hourly fee was $130.00. Objection at 2, Exhibit 2.

Embry & Neusner responds to EBC's objection by citing *Connecticut State Dept. of Social Services et al. v. Thompson*, 289 F.Supp.2d 198 (D.Conn. Oct. 23, 2003), where the District Court awarded fees at rates of $325.00 and $375.00 per hour in litigation involving

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[6] EBC also "questions the need for three attorneys on this file and notes the significant amount of time spent by counsel in preparing for Dr. Glenney's deposition . . . [which] only lasted 30 minutes, but it states that it "will not burden the court with assessing the reasonableness of time spent by counsel in the prosecution of this case." EBC Objection at 1. Based on EBC's statement, these questions and observations have not been treated as an objection. *See Corcoran v. Preferred Stone Setting*, 12 BRBS 201 (1980) (The party challenging a fee award bears the burden of showing that the award is unreasonable). Nevertheless, the reasonableness of all services has been independently considered, and I find that the work could have been reasonably regarded at the time that it was performed as necessary to establish entitlement. *Cabral v. General Dynamics Corp*., 13 BRBS 97, 100 (1981).

[7] Judge Smith dissented, stating that the $220.95 rate was excessive and that he would instead award fees at a $200.00 per hour rate. Slip op. at 5. The appellate litigation before the Board in *Dousis* took place in 2002.

Medicare claims. The firm also stated that it raised its billing rate from $200.00 to $225.00 per hour in 2000, and it argues that the increase to $250.00 is now justified based on the fact that the Department of Labor has determined that the cost of living has increased by more than ten percent over the past four years.

Upon review, I find that the $250.00 hourly rate sought by Embry & Neusner is reasonable. In making this finding, I note that $250.00 per hour has been found reasonable in other recent New London cases. *See e.g., Gavitt v. Electric Boat Corp.,* Case No. 2004-LHC-01561 (Sutton, ALJ June 10, 2004) (awarding fees to Stephen Embry); *Lockamy v. Electric Boat Corp*., Case No. 2004-LHC-01266 (Geraghty, ALJ June 28, 2004) (awarding fees to Attorney Stephen Embry). Moreover, the Board has approved use of the cost of living increases to the national average weekly wage in determining whether an increase in an attorney's billing rate is reasonable. *See Parks v. Naval Personnel Command/MWR*, BRB No. 04-0179 (Oct. 27, 2004) (unpublished), slip op. at 13. After taking into account the quality of the representation, the complexity of the legal issues involved, and the amount of the benefits obtained, I conclude that a total fee in the amount of $8,744.55, representing $7,891.25 in fees and $853.30 in expenses, is reasonably commensurate with the necessary work done. Accordingly, EBC's objection is overruled.

III. Order

(1) The Employer, Electric Boat Corporation, shall pay to the Claimant, William T. Curry, III, permanent partial disability compensation pursuant to 33 U.S.C. § 908(c)(21) at the rate of $537.40 per week, commencing January 17, 2003 and continuing thereafter until further order, plus interest on any past due compensation at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid;

(2) The Employer shall be allowed to claim a credit pursuant to 33 U.S.C. § 914(j) against the compensation awarded in the amount of the compensation paid to the Claimant for temporary partial disability from January 17, 2003 to the present;

(3) The Employer shall furnish all reasonable and necessary medical care required by the Claimant for his work-related back and right hip injuries;

(4) The Employer shall pay attorney's fees in the amount of $8,744.55 to Embry & Neusner; and

(5) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts